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No. 84-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

In Re MOBIL OIL CORPORATION,
ATLANTIC RICHFIELD COMPANY,
GULF OIL CORPORATION,
PHILLIPS PETROLEUM COMPANY,
SHELL OIL COMPANY
and TEXACO INC.,

Petitioners.

On Petition for a Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

On October 5, 1984, a panel of the Court of Appeals recalled the mandate of its June 19 Order—the order sought to be reviewed herein—and affirmed (1) the grant of a petition for mandamus without answering briefs pursuant to Rule 21(b), and (2) the use of 28 U.S.C. § 1651 to overturn a discretionary stay pending appeal entered by the District Court to preserve jurisdiction over a significant decision involving disclosure of documents under the doctrine of public access. The immediate, and doubtless intended, effect of this Order is to eliminate the object of the instant petition for a writ of mandamus by vacating the June 19 Order. A copy of the October 5 Order is attached hereto as APPENDIX G.

Our Petition points out that the questions it presented fall within that small category of cases that recur without possibility of review because in most instances controversy is mooted before an appeal could be taken. Thus, this Court could exercise its discretion to consider these questions under the doctrine that controversy remains where government action is of such limited duration that it is "capable of repetition, yet evading review . . . ." *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911).

Such discretionary exercise of jurisdiction is not necessary with respect to the questions presented and numbered 2, 3 and 4 in the Petition. Petition p. (i). This is because each of these questions arises from the October 5 Order as well and, therefore, petitioners may now pursue their review in this Court on a petition for a writ of certiorari. The fact that the order to disclose documents is not instantly effective, due to the sixty-day review procedure and the resulting seventy-day deferral of disclosure built into the disclosure order, now makes such appeal practicable.

Exercise of discretionary jurisdiction with respect to the first itemized question—whether appellate Rule 41 applies to proceedings on petitions for extraordinary writs —would be appropriate. The Order of October 5 maintains the view that Rule 41 does not apply to proceedings for mandamus but appeal of the Rule 41 issue from the October 5 Order may be foreclosed because petitioners now have notice that the mandate will issue "forthwith." APP. G.[1] With this reply, the Rule 41 question has been

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[1] In most instances, and as happened with respect to the now-vacated June 19 Order, a party would not have notice of improper, premature issuance of the mandate, pursuant to the Ninth Circuit's unpublished practice to treat mandamus proceedings as not subject to Rule 41, and would be injured where issuance of a mandate involves irreparable loss of injunctive relief. It was only the unique factual circumstance of an automatic 70-day deferral of

fully briefed. As set forth in the Petition, pages 10-12, 16-19, resolution of this question will eliminate a clear conflict with the Second Circuit, ensure consistent administration of Rule 41 and ensure that petitioners and other litigants in the Ninth Circuit are not further injured by a practice that can foreclose rights of appeal.

For the foregoing reasons, this reply brief addresses primarily the question of the scope of Rule 41, in Part I, responding to the arguments raised by Dow Jones & Company, Inc.'s opposition, pp. 26-30 (hereinafter "Opposition"). Part II briefly touches on other misleading aspects of the Opposition.

I. DOW JONES HAS FAILED TO DEMONSTRATE THAT PROCEEDINGS IN MANDAMUS ARE NOT SUBJECT TO RULE 41(a)

Dow Jones has no authority for the proposition that proceedings under 28 U.S.C. § 1651 are not subject to Rule 41. Its contention that review by way of a petition for mandamus is not an appellate proceeding is contrary to common sense and well-settled authority. Petition, pp. 18 & n.22. Dow Jones argues that mandamus proceedings are not appeals subject to general provisions such as Rule 41 because the automatic stay provisions of Rule 41 are "utterly unworkable" and make no sense in a mandamus proceeding. Opposition at 26-27. But this confuses the issue of the nature of the proceedings, which are obviously appellate, with Dow Jones' separate claim that its particular petition required expedited treatment. A need for expedited treatment, however, does not require resort to mandamus. Any type of appellate proceeding can obtain expedited implementation of a final ruling. Rule 41 is flexible and permits a court of appeals to dispense with the usual delaying of the effect of final orders, *but it must so state in an order.* Rule 41, FED.

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disclosure built into the particular injunctive relief vacated by the June 19 Order that gave petitioners an opportunity to seek extraordinary review.

R. APP. P. ("unless the time is shortened or enlarged by order"). Thus Dow Jones' suggestion—that the "emergency" nature of its petition justifies its contention that Rule 41 does not apply—misses the mark.

It is plain on the face of the appellate rules that mandamus proceedings are encompassed by Rule 41(a). Petition at 17-18. Dow Jones' only rejoinder is that, since Rule 21 applies specifically to proceedings involving extraordinary writs, it is the *only* appellate rule governing such proceedings. Opposition at 27. Such reasoning is specious and would leave proceedings for extraordinary writs without sufficient procedural guidance to reasonably advise litigants how to proceed.

Dow Jones' claim that in other decisions on extraordinary writs Courts of Appeals have acted "without specifying when the mandate shall issue" (Opposition at 28) is equally pointless. In the absence of an order specifying the time when the mandate shall issue, Rule 41 specifies the time. Indeed, that is the essence of petitioners' position. Thus, the rule results in a workable scheme in which litigants always have notice of the timing of the issuance of the mandate while there is preserved flexibility to shorten or enlarge the time, as circumstances require. In none of the cases cited by Dow Jones is the application of Rule 41 an issue, nor were petitions for rehearing filed. Where the court did not specify a time there is nothing to indicate that the automatic provisions of Rule 41 were not applied.[2]

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[2] These cases, erroneously cited by Dow Jones, include *United States v. Harper*, 729 F.2d 1216, 1226 (9th Cir. 1984); *Ohio Environmental Council v. United States District Court*, 565 F.2d 393, 398 (6th Cir. 1977); *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1009 (3d Cir. 1976); *In re Greensboro News Co.*, 727 F.2d 1320, 1322, 1326 (4th Cir.), *pet. for cert. filed*, 52 U.S.L.W. 3908 (June 4, 1984) (No. 83-1995). In *Local 391, International Brotherhood of Teamsters, Etc. v. Ward*, 501 F.2d 456, 459 (4th Cir. 1974) no writ issued at all, but an interim stay that was not subject to Rule 41 was lifted without delay.

The argument that the June 19 order is "interim" is also wrong. That order granted all the relief sought by Dow Jones in its petition, making it the final judgment in Ninth Circuit docket No. 84-7262. Accordingly, the decision in *York International Building, Inc. v. Chaney*, 527 F.2d 1061 (9th Cir. 1975), presented and quoted in the Opposition at 29, is of no relevance. *York* was a decision on an interim motion in a pending bankruptcy appeal. Precisely because it was not a final judgment, the Ninth Circuit correctly concluded that Rule 41 did not apply.[3] Moreover, it is plainly incorrect for Dow Jones to argue that the June 19 Order is "interim" because "it in no way resolves the issue of public access to these documents." Opposition p. 29. The merits of public access should not have been resolved in the mandamus proceeding below because only the propriety of the stay pending appeal was presented by Dow Jones. Indeed, the more recent October 5 Order (APP. G) is improper precisely because, and contrary to even Dow Jones' intent in petitioning the Ninth Circuit, it indicates that the June 19 Order did resolve, or at least prejudge, the public access issue as well as the issue of the stay pending appeal.

Dow Jones' Opposition is silent on the significant issue of notice and the problems caused by a Ninth Circuit practice that is unpublished, in violation of 28 U.S.C. § 2077 (SA-1). Finally, it fails to address the existence of a conflict with the Second Circuit on the scope of Rule 41. Defendants-petitioners reasonably relied upon the language of Rule 41(a) in concluding that a petition for rehearing automatically stayed the mandate of the June 19 Order, leaving Judge Gray's stay pending appeal in effect.

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[3] If Dow Jones had pursued the more logical route to attacking the stay pending appeal—a motion to vacate filed in the merits appeal docket, Ninth Circuit No. 84-5878—then any order granting such motion would have been interim in that docket; defendants would have known that Rule 41 provided no automatic deferral of its effect and could have initiated action accordingly.

II. OTHER ARGUMENTS MADE IN THE OPPOSITION MISS THE POINT OF THE PETITION FOR MANDAMUS

Dow Jones' argument that defendants are unlikely to succeed on the merits of the underlying public access appeal, Opposition pp. 21-26, requires only limited comment. First, the presentation of the District Court decision as conferring a right of "contemporaneous access" (Opposition p. 2, 3, 22, 25) is incorrect for the reasons set forth in the Petition at p. 23 & nn. 31-32. Dow Jones has resorted to deliberate misrepresentation of a recent case in an attempt to rehabilitate this analysis.[4]

It is equally incorrect for Dow Jones to discuss the ruling below, and the question on appeal, in terms of access at the "adjudicative stage." Opposition pp. 1, 22, 24-26. This phrase is too vague to be useful in assessing the questions below, since it applies to the period prior to adjudication without apparent limit. By this approach Dow Jones argues that immediate access is harmless because most of the protected material will be disclosed eventually because pending motions that include sealed material will be decided or because the antitrust case will end and the presumption of access will then attach. One could make these arguments at any time items are filed at the courthouse, however remote in time or reasonable expectation from dispositive ruling. By this approach,

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[4] The opposition, p. 22, quotes from *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1310 (7th Cir. 1984), adding the bracketed comment re access "[*i.e.*, prior to decision]." Public access in that case was ordered and affirmed because the report in issue had *already* been the subject of dispositive evidentiary ruling, following evidentiary hearings in open court. 732 F.2d at 1309 ("We hold, therefore, that the presumption of access applies to the hearings held and the evidence introduced in connection with Continental's motion to terminate."). Indeed, Dow Jones was a party to this case, 732 F.2d at 1304, and its "claim for access to the Report [was] predicated on the Report's introduction into evidence at the June 30 hearing," and not its relevance to a submitted but undecided motion. 732 F.2d at 1305 n.4.

control over disclosure of items subject to a protective order passes from the court to opposing counsel who may force disclosure merely by submitting materials with some motion or other filing. Moreover, there is no assurance that motions will be ruled upon or that a case will end due to action by the government rather than external developments.[5] Where the purpose of access is to monitor government action—in this context judicial performance, *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)—extension of public access *prior* to dispositive judicial action rests public access on a slippery slope that extends to all phases of pretrial.

On the more immediate question arising from appellate Rule 21(b), Dow Jones now argues that the June 19 Order was not *ex parte* because seven briefs purportedly addressing the stay pending appeal had been filed. Opposition p. 15. Dow Jones is untroubled by the fact that the few filed before the June 19 order (1) were filed in other dockets and (2) did not address the issues raised by Dow Jones' petition for mandamus. The unfairness of such an argument is discussed in the Petition p. 15. On the related question involving oral argument, Dow Jones misrepresents petitioners' position. We do not assert a right to oral argument *per se*, but only the rights conferred by Rule 34.

Finally, the contention that no confidential documents will be released pursuant to the disclosure order is misleading and begs the question on the appeal that petitioners seek to preserve. See Opposition at 13-14. The documents subject to the District Court's disclosure order

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[5] Cases may settle or be voluntarily dismissed, motions may be withdrawn or mooted, all without dispositive judicial involvement. Denial of a motion for summary judgment is usually a non-dispositive act simply stating that disputes remain that must be resolved at trial. For all these reasons Dow Jones is incorrect in asserting that petitioners have admitted that the documents will be released someday and that only timing is at issue.

have been, and will be until expiration of the seventy-day period, subject to a valid protective order under Rule 26(c), FED. R. CIV. P. Under its general standards the materials are confidential and some are commercially sensitive under the more specific standard of Rule 26(c)(7). The effect of the District Court's ruling is to make findings under Rule 26(c) irrelevant once material is filed at the courthouse because, at that point, confidentiality is defined under the far more stringent standard of presumptive public access. Items that are confidential or commercially sensitive under the Rule 26(c) standard may not—indeed, likely will not—be so under the public access standard. The issue on appeal is which standard applies during the pretrial phase of civil litigation, and precisely when (and why) does the presumption of public access override Rule 26(c).

When Dow Jones repeatedly declares that no confidential or commercially sensitive items will be disclosed, it is applying the public access standard. Defendants-petitioners are equally correct in stating that, absent relief, the documents that will be disclosed are confidential, as defined under Rule 26(c). We did not ask this Court to resolve which definition or standard of confidentiality applies—only to take steps necessary to preserve jurisdiction over this question.

CONCLUSION

A portion of the petition for a writ of mandamus may be dismissed as a result of the Ninth Circuit's October 5 Order vacating its Order of June 19. With respect to the question of the scope of Rule 41, however, this Court should exercise its discretion to hear this question, resolving a conflict between the Second and Ninth Circuits, by ruling that proceedings for extraordinary writs are subject to Rule 41, FED. R. APP. P.

Respectfully submitted,

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APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In Re:

COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION.

No. 84-5878

DC # MDL-150 WPG
Central California

STATE OF ARIZONA; STATE OF CALIFORNIA, *et al.*,
Plaintiffs-Appellees,

vs.

ATLANTIC RICHFIELD CO., *et al.*,
Defendants-Appellants.

No. 84-7262

DC # MDL 150 WPG
Central California

DOW JONES AND COMPANY, INC.,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,

and

STATE OF ARIZONA; STATE OF CALIFORNIA, *et al.*,
Real Parties In Interest.

Before: SCHROEDER, ALARCON and FERGUSON, Circuit Judges

ORDER

[Filed October 5, 1984]

Defendants have petitioned for rehearing of our order of June 19, 1984, in case 84-7262 and suggest the appropriateness of rehearing en banc. Defendants also move for recall and clarification of the mandate in that case, and seek a stay pending appeal in 84-5878.

The petition for rehearing is denied. Defendants contend that the petition for writ of mandamus was improperly granted without requesting them to respond under Fed. R. App. P. 21. Defendants had previously responded to substantially similar arguments in a prior petition (No. 83-7634) and raised in their opposition to petitioner's application to vacate stay their arguments in support of the district court's order. Defendants' contentions have been fully considered by the court.

Defendants' remaining contentions in the petition for rehearing go to the merits of petitioner's request for mandamus relief. As noted, those contentions were previously considered and rejected.

The public and the press have the right to inspect public records and documents, including pretrial judicial records and documents. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 2613, 73 L.Ed. 2d 148 (1978); *Associated Press v. United States District Court for the Central District of California*, 705 F.2d 1143, 1145 (9th Cir. 1983). The right of access is grounded in both the common law and the first amendment. *Associated Press*, 705 F.2d at 1145.

This right is not absolute, however, and must yield when access by the public or press would either harm a litigant's competitive standing through the release of

sensitive business information or conflict with a defendant's right to a fair trial. *Nixon*, 435 U.S. at 598; *Associated Press*, 705 F.2d at 1145.

Where access to pretrial documents in criminal cases is denied, this court requires that the party opposing access establish that nondisclosure is "strictly and inescapably necessary in order to protect the fair trial guarantee." *United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982), *quoting Gannett Co. v. DePasquale*, 443 U.S. 368, 440 (1979). The standard in civil cases should be no less demanding.

Defendants were not required to make any showing with respect to the documents at issue here. The blanket protective order allowed defendants to place items under seal unilaterally.

This court has previously ordered disclosure of similar documents in a civil proceeding. In *Olympic Refining Co. v. Carter*, 332 F.2d 260, 265-66 (9th Cir. 1974), this court required disclosure to a nonparty of documents in an antitrust action despite the defendant's contention that the documents contained trade secrets and other sensitive, competitive information. *Olympic*, 332 F.2d at 265-66.

The Sixth and Seventh Circuits have required the disclosure of sealed documents in similar contexts. *See Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983); *In the Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984).

Unlike the situation in *Seattle Times Co. v. Rhinehart*, —— U.S. ——, 104 S. Ct. 2199, 2207-08 (1984), the documents at issue here are not the raw fruits of discovery, but are public components of a civil trial.

There was no principled basis, either in defendants' oppositions to the intervenor's motion to vacate the stay or

the defendants' response to the previous mandamus petition, for denying immediate implementation of the disclosure procedure.

The court's mandate issued with the June 19 order granting the writ of mandamus. Defendants' motions for recall and clarification of the mandate are granted. The parties shall forthwith begin to implement the procedures for review and disclosure of documents established by the district court's order of April 6, 1984. The sixty-day and seventy-day periods specified in that order will begin to run upon the entry of this order. A certified copy of this order shall constitute the mandate of the court.

Defendants' motion for stay of the district court's order pending the disposition of appeal 84-5878 is denied.

The panel has voted to reject the suggestion for rehearing en banc. The suggestion will be disposed of by separate order after consideration by the full court.